

**DISTRICT COURT OF PRIZREN**  
**P. No. 134/11**  
**02 August 2011**

**IN THE NAME OF THE PEOPLE**

The District Court in Prizren, in a court comprised of EULEX Judge Tore Thomassen, as Presiding Judge, EULEX Judge Dean Pineles and Judge Raima Elezi as court members, with court recorder Tarik Mripa, in the criminal case against the **Defendants E.K and H.M**, charged pursuant to Indictment PPS.no.75/2010 filed by the Special Prosecution Office of the Republic of Kosovo, Pristina dated 30.03.2011 and partly confirmed on 29.04.2011 (KA 76/11), with the criminal offence of **War Crimes against the civilian population**, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 23 and 121 (1) of the Criminal Code of Kosovo (CCK) read in conjunction with Article 3 Common to the four Geneva Conventions of 12.08.1949 and of Article 13.2 of Protocol II of 08.06.1977, Additional to the 1949 Geneva Conventions (Additional Protocol II), and the **Defendants Mu.H, Mi.H, N.H, N.B and J.K** charged with **providing assistance to the perpetrators after the commission of criminal offences pursuant to Article 305 paragraph 2 of CCK**,

after holding the open main trial on June 28, 29, 30, July 7, 26, and 27 2011, in the presence of the SPRK Prosecutor Maurizio Salustro; the injured parties, the witnesses D.B and S.B (on June 28 and 29); and the representative of the injured parties Jelena Nikolic from DRC Belgrade (on July 26 and 27),

the representative of the defendant E.K, the lawyer Ethem Rogova; of the defendant H.M, the lawyer Osman Zajimi; of the defendant Mu.H, the lawyer Gezim Kollgjaku; of the defendant Mi.H, the lawyer Xhavit Krekku; and of the defendant N.H, the lawyer Hajrip Krasniqi, and

after deliberating and voting on July 28 and 29 and August 2, 2011 took and announced the following:

**JUDGMENT**

1. The defendant **E.K**, father's name ....., born on ..... in the ....., currently residing in the ....., has completed high school, Kosovar, Albanian, poor financial situation, in detention since 14.12.2010, **is guilty**,

because on the night of the 17<sup>th</sup> and in the early morning of 18<sup>th</sup> of July 1998, in his capacity as member of the Kosovo Liberation Army (KLA), and in co-perpetration with other so far unidentified KLA soldiers, applied measures of intimidation and terror against the Serbian

civilian population of Opterushe/Opterusca by taking part in a deliberate armed attack against the Serbian households in said village.

By reason thereof the defendant E.K committed in co-perpetration the criminal offense of **War Crimes against the civilian population**, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 23 and 121 (1) of the Criminal Code of Kosovo (CCK) read in conjunction with Article 3 Common to the four Geneva Conventions of 12.08.1949 and of Article 13.2 of Protocol II of 08.06.1977, Additional to the 1949 Geneva Conventions (Additional Protocol II).

E.K is **sentenced** as follows: pursuant to Article 142 of the CCSFRY to a term of five (5) years of imprisonment, in which sentence the time spent in detention on remand shall be taken into account from 14 December 2010.

2. The defendant **H.M**, father's name ....., born ..... in the ....., currently residing in ....., carpenter, finished primary school, Kosovar, Albanian, poor financial status, in detention since 14.12.2010, **is acquitted**,

because pursuant to Article 390 3) of the Criminal Procedure Code of Kosovo (KCCP) it has not been proven that he has committed the act with which has been charged, namely on the night of the 17<sup>th</sup> and in the early morning of 18<sup>th</sup> of July 1998, in his capacity as member of the Kosovo Liberation Army (KLA), co-perpetration with other so far unidentified KLA soldier, he did not apply measures of intimidation and terror against the Serbian civilian population of Opterushe/Opterusca because he did not take part in a deliberate attack against the Serbian households in said village.

By reason thereof the defendant H.M did not commit in co-perpetration with other not yet identified KLA-soldier the criminal offense of **War Crimes against the civilian population**, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 23 and 121 (1) of the Criminal Code of Kosovo (CCK) read in conjunction with Article 3 Common to the four Geneva Conventions of 12.08.1949 and of Article 13.2 of Protocol II of 08.06.1977, Additional to the the 1949 Geneva Conventions (Additional Protocol II).

3. The defendant **Mu.H**, father's name ....., mother's name ....., born .... in ..., ....., finished primary school, working as carpenter, Albanian, **is guilty**,

because he assisted E.K (under investigation for the crime of War Crime against the civilian population, because in co-perpetration with other so far unidentified KLA-soldiers he applied measures of intimidation and terror against the Serbian civilian population of Opterushe/Opterusca village by taking part in a deliberate armed attack against Serbian households located in said village) by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Rogove village on 23 February 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

By reason thereof the defendant Mu.H assisted E.K after the commission of the criminal offences of which E.K is found guilty, provided for and punished by Article 305 paragraph 2 of the Criminal Code of Kosovo.

Mu.H is **sentenced** as follows: pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo to six (6) months of imprisonment. Pursuant to Articles 43-44 of the CCK the sentence is suspended, if the convicted person does not commit another criminal offence within a period of one (1) year.

4. The defendant **Mi.H**, father's name ....., mother's name ....., born on .... in ....., where he currently resides, finished high school, working as carpenter, Albania, **is guilty**,

because he assisted E.K (under investigation for the crime of War Crime against the civilian population, because in co-perpetration with other so far unidentified KLA-soldiers he applied measures of intimidation and terror against the Serbian civilian population of Opterushe/Opterusca village by taking part in a deliberate armed attack against Serbian households located in said village) by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Rogove village on 23 February 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

By reason thereof the defendant Mi.H assisted E.K after the commission of the criminal offences of which E.K is found guilty, provided for and punished by Article 305 paragraph 2 of the Criminal Code of Kosovo.

Mi.H is **sentenced** as follows: pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo to six (6) months of imprisonment. Pursuant to Articles 43-44 of the CCK the sentence is suspended, if the convicted person does not commit another criminal offence within a period of one (1) year.

5. The defendant **N.H**, father's name ..., mother's name ....., born on .... in ....., ....., finished primary school, owner of a café bar, Albanian, **is guilty**,

because he assisted E.K (under investigation for the crime of War Crime against the civilian population, because in co-perpetration with other so far unidentified KLA-soldiers he applied measures of intimidation and terror against the Serbian civilian population of Opterushe/Opterusca village by taking part in a deliberate armed attack against Serbian households located in said village) by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Rogove village on 3 March 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

By reason thereof the defendant N.H assisted E.K after the commission of the criminal offences of which E.K is found guilty, provided for and punished by Article 305 paragraph 2 of the Criminal Code of Kosovo.

N.H is **sentenced** as follows: pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo to six (6) months of imprisonment. Pursuant to Articles 43-44 of the CCK the sentence is suspended, if the convicted person does not commit another criminal offence within a period of one (1) year.

6. The defendant **N.B**, father's name ....., mother's name ....., born ....., in ....., ....., bachelor of economy, Albanian, **is guilty**,

because he assisted E.K (under investigation for the crime of War Crime against the civilian population, because in co-perpetration with other so far unidentified KLA-soldiers he applied measures of intimidation and terror against the Serbian civilian population of Opterushe/Opterusca village by taking part in a deliberate armed attack against Serbian households located in said village) by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Rogove village on 3 March 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

By reason thereof the defendant N.B provided assistance to E.K after the commission of the criminal offences of which E.K is found guilty, provided for and punished by Article 305 paragraph 2 of the Criminal Code of Kosovo.

N.B is **sentenced** as follows: pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo to six (6) months of imprisonment. Pursuant to Article 43-44 of the CCK the sentence is suspended, if the convicted person does not commit another criminal offence within a period of one (1) year.

7. The defendant **J.K**, father's name ....., mother's name ....., born ....., in ....., .... where he teaches at the University, Kosovo Albanian, **is guilty**,

because he assisted E.K (under investigation for the crime of War Crime against the civilian population, because in co-perpetration with other so far unidentified KLA-soldiers he applied measures of intimidation and terror against the Serbian civilian population of Opterushe/Opterusca village by taking part in a deliberate armed attack against Serbian households located in said village) by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Pristina on 8 March 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

By reason thereof the defendant J.K assisted E.K after the commission of the criminal offences of which E.K is found guilty, provided for and punished by Article 305 paragraph 2 of the Criminal Code of Kosovo.

J.K is **sentenced** as follows: pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo to six (6) months of imprisonment. Pursuant to Article 43-44 of the CCK the sentence is suspended, if the convicted person does not commit another criminal offence within a period of one (1) year.

8. Each of the convicted persons shall – one for all and all for one - shall reimburse the costs of criminal proceedings pursuant to Article 102 Paragraph (1) of the KCCP with the exception of the costs of interpretation and translation. A separate ruling on the amount of the costs shall be rendered by the court when such data is obtained pursuant to Article 100 Paragraph (2) of the KCCP.

9. In addition **E.K** shall cover the additional costs of apprehension and escort.

10. **E.K and H.M** shall be released from detention on remand as the conditions of Article 281 paragraph (1) subparagraph 2) of the KCCP are not fulfilled.

11. **Property claims** shall be dealt with in a separate civilian litigation.

## **REASONING**

### **I Procedural background**

On 20.12.2007 the district court of Belgrade dismissed charges against S.M for the criminal offence of War crimes against the civilian population in Opterüshe/Opteruša on 17.-21.7.1998. On 3.3.2009 the Supreme Court of the Republic of Serbia revoked the judgment and sent the case back to the first instance court for re-trial.

On 19.8.2010 the head of the Special Prosecution Office of the Republic of Kosovo (SPRK) issued a request to Serbia for an arrest warrant and related evidentiary materials in the case of S.M.

On 20.8.2010 the public prosecutor of the SPRK issued a ruling on initiation of investigation against S.M for the criminal offence of War crimes against the civilian population in Opterüshe/Opteruša on or about 18.7.1998.

On 29.11.2010 the deputy war crimes prosecutor of the Republic of Serbia informed the public prosecutor of the SPRK that due to well-known current political circumstances neither he, the court recorder or any other court staff is able to come and give evidence in Kosovo in the investigation against S.M in their official capacity.

On 30.11.2010 the public prosecutor of SPRK issued a ruling on expansion of the investigation against E.K, S.B and H.M for the criminal offence of War crimes against the civilian population in Opterüshe/Opteruša on or about 18.7.1998.

On 1.12.2010 the public prosecutor of the SPRK issued a ruling on termination of the investigation against S.M.

On 14.12.2010 police officers of the War Crimes Investigation Unit (WCIU) arrested E.K and H.M.

On 14.12.2010 the EULEX pre-trial judge of the district court of Prizren issued a ruling for detention on remand against E.K and H.M for one month until 14.1.2011. On 21.12.2010 the three-judge court of the district court of Prizren rejected the appeals against the ruling.

On 13.1.2011 the three-judge panel of the district court of Prizren issued a ruling of extension of detention on remand against E.K and H.M for two months until 14.3.2011. On 21.1.2011 the Supreme Court of Kosovo rejected the appeal of E.K against the ruling.

On 8.3.2011 the public prosecutor of the SPRK issued a ruling on expansion of the investigation against Mu.H, Mi.H, N.H, N.B and J.K for the criminal offence of providing assistance to perpetrators after the commission of criminal offences.

On 14.3.2011 the EULEX pre-trial judge of the district court of Prizren issued ruling for extension of detention on remand against E.K and H.M for one month until 14.4.2011.

On 30.3.2011 the public prosecutor of the SPRK filed indictment (PPS 75/2010) in the district court of Prizren against E.K and H.M for the criminal offences of 1) War crimes against the civilian population in Opterüshe/Opteruša on 17. and 18.7.1998 and 2) War crimes against the civilian population in Opterüshe/Opteruša on 18.7.1998; and against Mu.H, Mi.H, N.H, N.B and J.K for the criminal offence of providing assistance to perpetrators after the commission of criminal offences.

On 4.4.2011 the three-judge panel of the district court of Prizren issued a ruling of extension of detention on remand against E.K and H.M for two months until 4.6.2011.

On 29.4.2011 the EULEX confirmation judge, after having held a hearing, dismissed charge no. 2 against E.K and H.M but confirmed the other charges. On 9.6.2011 the three-judge panel of the district court of Prizren rejected the appeals of E.K, Mu.H and Mi.H against the confirmation ruling.

On 13.5.2011 the public prosecutor of the SPRK issued a ruling on suspending the investigation against S.B on the grounds that his whereabouts were unknown.

On 2.6.2011 the three-judge panel of the district court of Prizren issued a ruling for extension of detention on remand against E.K and H.M for two months until 4.8.2011.

On 28.6.2011 the main trial started in the district court of Prizren.

## **II Administered evidence**

## A. Witnesses

1. D.B (injured party)
2. S.B (injured party)
3. A.B
4. F.M
5. P.M
6. N.M
7. A.H

## B. Written evidence

The court admitted as evidence the following documents that were read out or considered as read out during the main trial:

### Prosecutor

1. Procedure of showing pictures to the witness D.B 26.10.2010
2. Procedure of showing pictures to the witness S.B 26.10.2010
3. Police report 2.12.2010
4. Police report 9.12.2010
5. Police report 21.12.2010
6. Log book submitted by A. H to WCIU on 21.12.2010
7. Records of witness statement of J.K on 8.2.2011
8. Records of witness statement of Mu.H on 23.2.2011
9. Records of witness statement of Mi.H on 23.2.2011
10. Records of witness statement of N.B on 3.3.2011
11. Records of witness statement of N.H on 3.3.2011

### E.K

12. Photo of massacre which occurred in Rugova 29.1.1999 (purportedly showing presence D.B's son)

## C. Hearing of the defendants

1. E.K
2. H.M
3. Mu.H
4. Mi.H
5. N.H
6. N.B
7. J.K

The court admitted as evidence the following statements that were considered as read out during the main trial:

1. E.K's statements on 14.12.2010 and 24.1.2011
2. H.M's statements on 14.12.2010, 22.12.2010, 24.1.2011 and 11.2.2011

3. Mu.H's statements on 23.2.2011 and 14.3.2011
4. Mi.H's statements on 23.2.2011 and 14.3.2011
5. N.H's statements on 3.3.2011 and 17.3.2011
6. N.B's statements on 3.3.2011 and 17.3.2011
7. J.K's statements on 8.2.2011, 8.3.2011 and 15.3.2011

### **III Summary of undisputed facts**

1. That an armed attack by KLA-units happened on the night of July 17<sup>th</sup>, and into the early morning hours of July 18<sup>th</sup> 1998 in the village of Optrushe/Optersusa (district of Rahovec/Orahovac).
2. The attack was directed towards a house owned by the family of the witness D.B which was occupied at the time by most of the Serbs families living in the village. During the attack, the Serb males returned fire on the attackers.
3. After the attack ended in the morning of the 18<sup>th</sup> of July, about 15 Serbs from within the house were loaded onto a tractor trailer and driven out of the village. Later the Serbian males were separated from the females. The Serbian females were handed over to the Red Cross after a couple of days. The Serbian males were never seen again. Some remnants from the Serbian males were discovered in a cave near Klina in May 2005.
4. The defendant E.K was a member of the KLA at the time of the attack, and both he and the defendant H.M lived in the village of Optrushe/Optersusa at the time of the attack.

### **IV Disputed facts**

1. The defendants E.K and H.M both deny being present and having taken part in the attack on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 in Optrushe.
2. The defendant H.M do not admit being a member of KLA.
3. To what extent the Serbians were under special status as civilians, especially because the men in the said household were armed and offered resistance during the attack.
4. The defendants Mu.H, Mi.H, N.H, N.B and J.K deny giving false statements when interviewed by EULEX investigators regarding the time the defendant E.K was wounded.

### **V Summary of Factual situation Proven**

1. KLA Units , including units from Operushe/Optersusha and surrounding villages, attacked the civilian house of D.B and her family in the village of Operushe/Optersusha from various sides on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 with armed

weapons. Present in the house during the attack were almost all Serbian inhabitants of the village, about 15 in total.

2. The Serbian males returned fire with rifles and pistols during the attack.
3. In the morning of the 18<sup>th</sup> of July the Serbian families gave up their resistance and surrendered to the KLA. Immediately afterwards the yard of the Bo houses were filled with KLA soldiers.
4. Amongst the soldiers filling up the yard were the defendant E.K and the defendant H.M.
5. The defendants E.K and H. M were both in the village of Opterushe on 17<sup>th</sup> and 18<sup>th</sup> of July 1998, were armed, and wore uniform and insignia of the KLA.
6. The defendant E. K was present outside the Serbian house, from the evening of the 17<sup>th</sup> to the morning of the 18<sup>th</sup> July. He played an active role in the attack as a commander of his unit. His further functions, detailed movements and actions on the 17<sup>th</sup> and 18<sup>th</sup> of July are unknown.
7. The defendant Ma was present outside the Serbian house, at least in the morning of the 18<sup>th</sup> of July. He was opposed to the attack and uttered his protests. He left the men under his command and only himself of his unit participated in the attack. He did not fire a single shot during the attack and left the area of the attack shortly after it was finished. His further functions, detailed movements and actions on the 17<sup>th</sup> and 18<sup>th</sup> of July are unknown.
8. The defendants Mi.H, N.H, N.B, and J.K when interviewed as witnesses all gave false statements to the investigators as to the date the defendant E.K was wounded, in order to provide an alibi defense for Ka.

## **VI Evidence related to the proven factual situation**

### **1. General**

Having concluded the main trial, the trial court finds the testimony of the witnesses and injured parties D.B and S.B in general trustworthy and credible because they have described the events in a similar way throughout the various statements given, and the court sees no reason why they should lie. In addition they have described the events in great detail. Accordingly the court places a lot of significance on these testimonies, primarily given in open court, but supplemented by their previous statements to the police/prosecution, in spite of incorrect factual statements on some minor parts, which the court considers normal, especially given that the incident happened 13 years ago.

The court does not find the statements given in court by the defendants credible for reasons stated below. However, the court considers the initial statements given by the defendants H.M to the EULEX prosecutor on 14 and 22 December 2010 in general correct and credible as this confirms the testimonies of the injured parties and the court finds no reason why he should lie regarding the events given in these statements.

## **2. The presence of E.K and H.M on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998**

One of the major factual points to be considered by the court is whether the defendants E.K and H.M were present in the village of Ofterushe during the KLA attack on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998.

## **3. The witness (and injured party) D.B**

In her trial testimony of 28<sup>th</sup> of June 2011 (minutes from page 13 onwards), D.B describes that about 15 Serbian persons were gathered in their house, both males and females, relatives and neighbors. Save for two other Serbian persons, all the Serbian persons in Ofterushe were gathered in the Bo house on the 17<sup>th</sup> of July 1998. The Serbs were gathered because of the tense situation in the village and as they had observed some KLA-soldiers passing by and therefore did not dare to go outside. After electricity was cut off to the house in the early morning of the 18<sup>th</sup> of July, and shooting started towards the house from various sides. When the shooting started, the Serbian women were ordered by their men to go downstairs and seek shelter in the basement of the house.

According to D.B, in her statement to the public prosecutor on 26.10.2010, the Serbian males in the house had rifles at their disposal and returned the fire after the shooting started. This was confirmed by her during the main trial.

After cross examination and considering the evidence in total, there is no indication that the Serbian males in the said house had any heavy weapons at their disposal, save from rifles and pistols.

The witness furthermore stated in court that she knew both the defendants E.K and H.M before the attack on the 17<sup>th</sup> of July, because they were all member of the same village.

H.M was also known to the witness as he, a carpenter, had installed doors in their house. H.M had also visited the house some days before the attack and had then had a conversation with her husband about the security situation in case of a conflict. In case of an attack from either party in the conflict, they would defend each other.

E.K, or "J" as he was commonly called, was also known to D.B as a neighbour. The voice of "J" was also recognized by her husband, N.B, as the man who called them from outside the house immediately before the attack started that her husband should not go out (Albanian: o D. mos dil, D. was what her husband was commonly called, page 19 of the minutes from 28<sup>th</sup> of June 2011).

After the Serbs surrendered in the morning of the 18<sup>th</sup> of July 1998, according to D.B, the yard of the house was filled with KLA soldiers, among them E.K and H.M, both dressed in black KLA uniforms and armed with rifles (page 23 of the minutes from the 28<sup>th</sup> of June 2011). Although the witness was somewhat unclear about the defendants being armed in her testimony in the main trial, after consideration she confirmed what she had stated to

the prosecutor that both of the defendants were armed with rifles when present in the yard immediately after the attack.

#### **4. The testimony of the witness S.B**

She is also considered as a trustworthy and reliable witness on certain key issues, although she may have some slips in her memory, as the court sees it, because of her medical condition. She testified to the public prosecutor on 27 October 2010 and her testimony in open court has to be evaluated with her earlier explanation to the prosecutor. It is understandable that not all of the details are clearly present regarding an incident that happened 13 years ago. In addition her present physical condition as a result of stroke, has affected her memory regarding the precise details.

S.B ,however, verifies, just like D.B, that all of the Serbs in the village were gathered in the Bo house during the attack; that the women went to the basement when the shooting started; that the Serbian males returned the fire; that the attack lasted all night until they surrendered and were then gathered in the yard; the yard filled up with armed KLA-soldiers in black uniforms; and that she recognized some from her village. To the public prosecutor on 27 October 2010 she remembered seeing “J” among the KLA-soldiers in the yard of the morning of the 18<sup>th</sup> July immediately after the attack.

When asked to estimate the number of KLA-soldiers who filled up the yard in the morning of the 18<sup>th</sup> of July, S.B answered in court :

*“...it might have been 2000 people.”*

The court finds this estimation grossly exaggerated and puts no emphasis on it. However the court does not consider that this incorrect figure stated by the witness, undermines the general credibility of the witness on key issues. Also the court considers that some of the details given by this witness has to be viewed critically. The court bases this on the general observation that eye witnesses may not always give a correct statement in every detail, as both observation and memory may cause some incorrectness. In addition the court points to the fact that 13 years have passed since the attack happened and the witness has suffered a stroke not too long ago.

#### **5. Photo identification**

In connection with her testimony to the prosecutor, the witnesses D.B and S.B identified “J” in a photolineup, although the latter with some difficulty. The defense counsels of the defendants have questioned the procedure of this photo-identification as in violation of Article 255.

The court notes that according to article 255, before the photo identification the witness shall first be asked “to provide a description of and indicate the distinctive features” of the person. This was not done. Instead the witnesses at the end of their statements were simply asked to look through an array of 69 colour photographs of males, and asked if they recognized anyone.

The witness D.B identified both defendants E.K and H.M in the photo identification done on 26 October 2010.

The court finds it sufficiently proven that the witness D.B knew the defendant J before the attack and could on this background identify him.

The witness S.B during her photo identification on the 27 October 2010 did recognize the defendant E.K, but did not identify the defendant H.M.

Based on this, the procedure outlined in article 255 paragraph (1) was not followed.

Although this is a violation of the said article, the court considers it a lesser violation in the given circumstances and points in particular to the following:

1. The procedure stated in article 255 (1) is especially important where the witness is to identify an unknown person. This was however not the case with the two witnesses as they were to identify persons already known to them and whom they had already mentioned by names in their statements prior to being exposed to the 69 photos.
2. One of the serious objections commonly raised against a photo identification is the danger of suggestability, or leading the witness toward a certain person or persons. With the procedure done in these lineups and given the fact that there was a sample of 69 pictures, the court finds no indication of the witnesses being lead towards specific persons.
3. The witness D.B admits she hadn't seen the defendant J for the last 10 years before the attack on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998, and had some problems identifying him in the photo collections of 69 photos from the inhabitants of Opterushe.
4. During the main trial the witness D.B identified both the defendants E.K and H.M.

Based on this, the photo identification was ruled as an admissible piece of evidence during the main trial.

In the final finding of the circumstances proven, the court is considering the photo identification as a relevant piece of evidence.

## **6. The defendants E.K and H.M**

have in court both denied taking part in the attack on the 17<sup>th</sup> and 18<sup>th</sup> of July.

### **6.1. H.M**

In his statements to the prosecutor on 14 December 2010, H.M confirmed some of the details stated by the witness D.B: that he knew the Serbs living in Opterushe and that they

had ordinary neighbourly relations, that he was a carpenter and had installed the doors in the Bo-house, that he had visited the Bo house shortly before the 17<sup>th</sup> of July 1998 and sought an agreement in case of an attack. Ma also admitted that on July 17<sup>th</sup> of 1998 he was in Ofterusha and that he was a member of KLA and had joined KLA before the attack on Ofterusha and that he was the leader of one of the two KLA groups in Ofterusha, while E.K was the leader of the other KLA group in the village. He also stated that there were not good relations between the two KLA groups in Ofterusha. He stated that he personally and on his own initiative went around to all the Serbs families and discussed the rising tension and what could be done about it about a week or two before the attack. He warned the families that KLA from Drenica would come and knock on the doors of the Serb families and “do terrible things, and that we could do nothing to impede it.” In this connection he also went to visit “D” or M.B, the husband of the witness D.B, who was a teacher and kind of village leader for the Serbs, to warn him of possible damages and to offer his assistance in that event.

In his statement of the 14 December 2010 H.M stated that he wanted to defend everyone in the village, including the Serbs and that the soldiers in his group supported his view. He further stated that there then came a KLA order from Drenica to attack the Serbs in the village and make them leave their houses. On page 5 of the statement from 14 December 2010, it continues with the following when asked by the Public Prosecutor (PP):

*HM: There was a special KLA unit that came from Drenica to take part in the attack... I told their commander, who was wearing a mask:” Where are you going, what do you want to do? We can just go and have coffee with the Serbs and talk to them:” But he replied that he just had an order and he had to proceed. So I told the members of my unit not to take part in the operation and that I would be the only one to take part in it, and that I would be very careful about what I and the others would do.*

*PP: What happened then?*

*HM: It was night time. I was in the Albanian part of the village. I was not shooting. I was part of this offensive just because people were saying that I was protecting the Serbs. I did not follow the entire operation. It lasted for about one hour but at some point I left because I did not feel like continuing my participation in it.*

*PP: How did the attack begin?*

*HM: At some point KLA just opened fire against the Serbian houses.*

*PP: Did Serbs return fire?*

*HM: Yes.*

*PP: Was E in your unit or the other unit?*

*HM: In the other. I did not have good relations with him.*

*PP: Was he part of the attack? Did you see him there?*

*HM: I saw E in the village, talking to the special unit that came from Drenica just before the attack. I did not see where E positioned himself during the attack.*

....

*PP: Did you see them on the night of the attack?*

*HM: No. As I told you, I was not among the group that shot, I stayed on the side, and in fact I got reproached because of that. I was actually trying to hide not to expose myself.*

*....*

*PP: Was there a moment when you entered the yard of the Serbian house that was under attack?*

*HM: No.*

*PP: But did you see when the other KLA soldiers entered the yard?*

*HM: As I said, one hour after the attack started I decided to go home. The attack continued until the next morning. In the morning, KLA members of the other unit came to my house asking my brother for a truck to move the Serbs to take them out of the village. My brother asked me and I told him that I did not allow that. After one hour they came back and asked for my tractor to put stuff taken from the Serbian houses onto them. I refused also this.*

*PP: Did you see the Serbs while they were leaving the village?*

*HM: Yes. My house is in the centre of the village and they passed right next to it. They were loaded on a tractor. They were heading towards the village of Samacraxhe. I saw them from inside the house, but they did not see me. I did not want to be seen because I was ashamed of what was going on.*

*PP: Did you recognize any of the Serbs?*

*HM: Yes, they were people from the village, we used to eat and drink together. There were a couple of women too.*

*PP: Do you know if anyone got wounded during the attack?*

*HM: I don't know.*

*PP: Do you know what happened to the Serbs afterwards?*

*HM: No. I could not get information from within KLA either, because of the tense relations I had with them.*

*..... where they told me that they had an order to take away my weapon from me. They told me I was not a good activist. Some time later, KLA came again and picked me up, saying that....had issued an order to bring me forcibly to Semetiste HQ. KLA picked me up and took me to Semetiste. There, a person named ..... interrogated me regarding my attitude toward KLA and behavior inside KLA. They viewed me as an obstacle, .....*

*PP: Is there anything you would like to add?*

*HM: I just want to add that as you see I am ready to speak the truth to you, but at the same time I am scared of other persons, who may be hostile to me. I am expecting to face problems because of my statements to you today...."*

When interviewed on the 22 Dec 2010 by an International Police Officer (IPO) the following can be read from the record:

“...

*HM: I was a KLA soldier and if you want to punish me because I was a commander then go ahead and do not drag out the process, I am innocent and as I said before I visited the Serbs before the war and we talked about how we would deal with and face the war. They were my neighbors and we got on well....*

....

*IPO: After the attack on the Serb houses on the 18<sup>th</sup> July 1998 were you still in the KLA?*

*HM: No, I was not even a commander before the attack. I was not in the KLA after the attack at all. All the men in my unit deserted the KLA after that also. The KLA was not functioning the way they should have and we were not satisfied with the situation.*

*IPO: What was it that you were not satisfied with?*

*HM: Ten days before the attack, three people with masks approached me with a list of 17 names, they knocked on my door and they were wearing black uniforms and masks and I asked them what they wanted and they told me that these 17 persons should be brought to us dead or alive, within 24 hours. I categorically refused them and I told them that they would have to kill me first before I do that. The accusation was that they were Serb collaborators and this was not true.*

*IPO: Who was named on the list?*

*HM: It is difficult for me to remember all of them, but..... and some young guys that were on the list I cannot remember now, but there were 17 names in total. They told me if I don't give a reply 24 hours they will come back again. I told them that they had nothing to ask from me, meaning that I was not interested with this issue. I told them to address the issue to Commander E "J" K. Afterwards I had to organize my group to guard me or to secure my house and to identify everyone who was trying to approach me but fortunately nobody tried to approach me again, nobody came. They day after I kinda announced this visit to the whole village that we would have to face very difficult challenges and that somebody is trying to set us up.*

*IPO: Why did you send them to E.K?*

*HM: Because he was a commander and I was not. I was only trying to protect myself and my neighbors.*

*IPO: Was that when you went to the Serb houses?*

*HM: No. it was weeks before that when I went to the Serbs. The tension was high at that time and I was trying to protect my ass. We had good relationship.*

*IPO: Who were the men with the masks?*

*HM: It was 12 midnight or 01.00 hrs in the morning so I don't know. But I recognized the same figures and heard the same voices the night of the attack. I don't know them now either but I believe he was part of the attack. A few hours before the attack I went to where the KLA were to see if I could get reinforcements, they were between Oterushe/Oterusa and Zociste Villages. I saw these three men there. I recognized them and I spoke to them. They said to me that they knew who I was. I did not see them taking part in the attack but I believe they were part of it. I don't know who*

*they are, but they were against the Albania population and against the Serb population. They were wearing KLA soldier but they cannot be called KLA soldiers. One of them approached me in a polite way, it would have been much better if I had killed him on the spot.*

*IPO: You had people looking out for you back then, do you still have people looking out for you.*

*HM: No, the situation is over now. Once the war was over there is no more reason for that. I have always told my soldiers not to take actions against civilians. While I told them that even if my father wears a Serb uniform, you cannot shoot him. When I saw these three guys between Opterushe/Opteresa and Zociste Villages, they were asking every KLA soldier to identify themselves. They stopped me and told me that I should go with them as there was still danger there as there were Serbs there. I refused and they told me that they did not want to deal with me as they could give me 2 bullets. I told them that it was not my goal to harm civilians and they said that they did not want to hear my opinion. I told them than not one of my soldiers would go with them. The back side of where the Serb house were was land owned by Albanians and I stayed there as part of the attack when the attack was going on and after one hour I ran away and went to my house.....*

*.....*

*IPO: You mentioned a ..... from..... village and you tell me more about him.*

*HM: During the attack of the Serbs I had 20 bullets and I didn't even fire a single one and when I went to my house, three days after that they approached me and one of the guys was ...He told me that I was a coward and that I didn't fire a single bullet and to give him the gun and that he would give it to the brave guys.....So basically I was going every day to get my gun back and finally they gave it back to me after 7 or 8 days. When I received the gun back I met my guys and I told them that I was no longer a KLA member....*

*.....*

*IPO: Did you speak to E.K the day before the attack or in the hours before the attack?*

*HM: Yes.*

*IPO: What was the conversation?*

*HM: He told me that some KLA persons arrived and that they wanted to attack the Serbs.*

*IPO: When you say the Serbs, to be clear, did he mean the Serb civilian houses and the Serbs inside.*

*HM: Yes, it was all planned and it was all to meant to happen very fast.*

*IPO: Were the others that you mentioned that were part of E.K's unit, were they present in the hours before the attack also.*

*HM: I only saw E present and we only passed each other. I told him that I don't care and that he was responsible for this village and that he was still a commander.*

*IPO: Was E.K injured during the war?*

*HM: He was but he was not injured in the village, my information is that he was injured on the road from Celine to Rugove while he was involved in a clash with a Serbian patrol.*

*IPO: When was he injured?*

*HM: After the event in Opterushe/Optersusa in July 1998, but I am not sure because I never followed the situation, maybe within a month of the event, but it was not a long time after the event for sure.*

*IPO: Was he injured when you talked to him in the hours before the attack on the Serb houses in July 1998.*

*HM: No he was walking.*

*IPO: Who gave you the rank of commander?*

*HM: I declared myself a commander because I was in the group that was protecting the houses. So we organized ourselves and I was commander. I answered to nobody. We were protecting our private property.*

*.....*

*IPO: Do you know the KLA unit that attacked the Serb houses Opterushe/Optersusa where were they from?*

*HM: I don't know where they came from, but according to their dialect they were not from my village or from the region..."*

On 24 January 2011 when interviewed again, the defendant H.M confirmed his earlier testimonies, although modifying it so that his own role was downplayed, and denied taking part in the attack. On this occasion he also added that when visiting the Serb house before the attack, he saw

*"a lot of things but I didn't want to tell, until now no one else saw this except me because I saw it with my own eyes, the Serbians had different types of weapons, all kinds of weapons, heavy machine guns, grenades, anti-tank weapon and radio sets. No one else knew this because I didn't tell anyone else this. Only my own eyes and God saw this about the weapons they had. ...."*

In court he confirmed his last statement to the prosecution on the 24<sup>th</sup> of January 2011 in which he denied taking part in the attack on the Serbian houses.

As the court sees it, the statements from H.M on 14 and 22 December 2010, appear credible and finds no reason why he should tell a different story than what happened, except of course than to downplay his own role in order to be treated more favorably as a defendant. Furthermore his testimony is generally compatible with the statements of the two witnesses D.B and S.B , but gives a better description, of course, of what happened on the side of the attackers.

In conclusion the court finds H.M's statements from 14 and 22 Dec 2010 credible and trustworthy, also including his own role in the attack and finds no reason why he should give false statements of these events. His statement from 24 of January 2011 is however less

credible, especially regarding his own role in the attack. His information about the weapons observed in the Serbian house is not considered credible, especially since no other evidence indicates that the Serbians fired rifles and/ or pistols after the attack started and they returned fire, and also considering that this information only appears in Ma's statement in January 2011 and not before, and at an occasion where he downplayed his own role in the attack.

## **6.2. The witness D.B**

stated she saw H.M amongst the soldiers filling up the yard after the Serbs surrendered in the morning of July 18 dressed in uniform, armed and with a baseball cap turned around.

On cross examination on 28<sup>th</sup> of June 2011 the minutes gives *inter alia* the following statements (page 36) regarding the defendant H.M:

*"...Osman Zajmi: In the morning of the 18<sup>th</sup> July, in the court yard of your house when you knew H, what was the distance between you and him?*

*D.B: Maybe five or six metres. He was not approaching me or anybody but was going through the yard. ...."*

Ma himself , however, in the statements cited above, admits that he was present in and during the attack for about an hour, before leaving and going home.

Based on this, the court finds it proven beyond reasonable doubt that the defendant H.M was armed and dressed in uniform amongst the soldiers attacking the Serbian house on the morning of the 18<sup>th</sup> of July for about an hour, without firing a single shot, before he went home. The court finds it further sufficiently proven that he strongly objected to the attack and was not especially active, as further described in his own - above mentioned - statements of the 14<sup>th</sup> and 22<sup>nd</sup> of December 2010.

## **7. E.K**

E.K has denied taking part in the attack on the 17 and 18 July 1998, as he was wounded in battle about a month before the attack took place.

In his statement to the prosecutor on 14 December 2010 which he upheld in court, he stated that he was a member of the KLA which he joined in March 1998 in Drenica. He got the position of company commander at the end of November 1998 and denies having this rank in July 1998. Although being from Ofterusha, he denies being based with KLA in Ofterusha, but rather being *"in the KLA Drenocac group, but not in the same group as other villagers from Ofterusha."* He further states that that he doesn't know about this attack in Ofterusha towards the end of July.

Furthermore he has explained that he was injured about a month prior to the 17<sup>th</sup> of July and was being treated for his wound at the time of the attack on 17 and 18 July.

## **8. E.K's alibi**

E.K has stated to the prosecutor on 14 December 2010, upheld in court during main trial, that he was

*" wounded on 11 July 1998 on the main road Gjakova-Prizren close to a village called Rugova e Hasit, Gjakova municipality.*

*PP: How did it happen?*

*EK: There was a fight there which lasted 10-15 minutes. There were just two of us, J.K, who was driving, and me. We were in a white Golf I or II civilian vehicle and an armored jeep came across us. They were uniformed Police and military. I opened fire against them with my AK-47 from a distance of 10 metres. Our car was moving as I fired. My friend did not shoot. I fired shots from the window, I leaned out of the car window and opened fire. There are two bridges at 150 metres distance. We reversed for those 150 metres until the junction to the village of Rugova. After a big exchange of fire with the people in the Jeep, we also came under fire from behind. A bullet hit our car and hit me in the back. When I got wounded, the car was still reversing. The bullet entered from the back door on the driver's side, it hit the back seat, the front seat and hit me. I could not see who shot me...*

*....*

*PP: Were you in the hospital?*

*EK: I got first aid by a doctor in Rugova e Hasit. I don't remember his name but he died some time ago. I was treated in the house of a S.G. He still lives in Rugova. Few hours later, I went to the hospital in Gajrak. It's a village close to Pagarusha. There was a KLA military hospital there. There, a doctor named A.H dressed and treated my wound. He now works at the Prizren hospital...I stayed for 15 days in the hospital. I don't remember the date, but at some point the hospital was moved because of an incoming Serbian offensive. Then I went to the house of my uncle's family in the village of Radbrava/Randobrava....I stayed there for 8 days. A doctor from Krusha ae Madhe... was coming every day to my uncle's house to treat my wound...*

*.....*

*PP: Going back to the story of Opterusha, have you heard about an attack that was carried out by KLA on the village?*

*EK: No.*

*PP: So you are telling me that although you are from Opterusha, you have not heard about an attack that happened there?*

*EK: Correct.*

*PP: So according to what you are saying , there should still be Serbs living in Opterusha?*

*EK: I don't know.*

*PP: But do you know if they are still there?*

*EK: They are no longer there but I don't know why.*

*....*

*PP: When you were wounded, were you wearing a uniform?*

*EK: Yes.*

*PP: What color?*

*EK: Black.*

*PP: Does this color bear any significance?*

*EK: No, I purchased the uniform myself actually. We just had KLA patches. In other words, it was my choice to have a black uniform, because I like the color.*

*PP: Do you know a person named H.M?*

*EK: Yes. I know him as a co-villager.*

*PP: Was he a KLA member as well?*

*EK: I don't know. If he was, he was not with me.*

*PP: Do you know anyone named ..... from Opterusha?*

*EK: Yes.*

*PP: Were any ... from Opterusha with KLA?*

*EK: No.*

*PP: Other than you, was anyone from Opterusha a KLA member?*

*EK: ..... was among the first to join and he was all the time with me. .... Also.*

*PP: Are they alive?*

*EK: No, they both died.*

*PP: So you just know these two who are now dead?*

*EK: I know others but they were not with me.*

*PP: Tell me names of anyone from Opterusha who was a KLA soldier from Opterusha in July 1998.*

*EK: I don't know anyone else.*

*PP: I thought you said that when you were in Drenovac I Zadriqi there were other soldiers from Opterusha. Isn't this correct?*

*EK: It's true but I did not know their names as they were young. Besides, I lived way from Opterusha for some time, I was in Switzerland for 5 years and in Pristina, so I got detached from the village life."*

As the court sees it, it is very unlikely that E.K doesn't know about the attack in Opterusha or that he can only remember names of KLA soldiers who are now dead. During the main trial E.K stated several times that he was proud of his involvement in KLA and the fight for freedom and independence for Kosovo. He is at present the leader of the regional KLA veteran association. It is therefore understandable that he wants to protect the legacy of the KLA and KLA soldiers by not mentioning them in connection with the attack in Opterusha.

On this background the court finds his statements of doubtful credibility. When considering the credible statements from the witnesses D.B and S.B and the defendant H.M given to the prosecution on the 14 and 22 December 2010, and seen in connection with the statements of the other defendants as mentioned in the following, the court finds the statements given by the defendant E.K are not credible.

**9. The defendants Mu.H, Mi.H, N.H, N.B and J.K** all testified in support of E.K being injured about a month before the attack in Opterushe/Opteresa happened.

**10. The defendant Mu.H** when giving his statement as witness to the prosecutor in Rogove village on 23 February 2011, stated that he has not heard of the attack on the Serbs in Opteresa village in 1998. He is also related to the defendant E.K.

When asked about the time E.K was wounded, the following appears from the signed witness statement:

...

*Investigator: When did it happen?*

*Witness: I think it happened at daylight. It was before lunchtime.*

*Investigator: Is this 1998?*

*Witness: It was the summer of 98.*

*Investigator: Was it June, July, August or September?*

*Witness: I think it was July?*

*Investigator: Why do you think it was July?*

*Witness: The main reason I remember the time is that at that time we cut the wheat. It was the exact time around 10<sup>th</sup> of July.*

*Investigator: Can you explain why the wound of E.K has anything to do with cutting wheat?*

*Witness: Because it was the wheat cutting time, which is between 10<sup>th</sup> of July and 10<sup>th</sup> of August. And this happened in the beginning of that season and not in August. I remember there were a lot of people around my house at that time because it was time to cut wheat.*

..."

He gave his statement as a defendant to the investigator on the 14<sup>th</sup> of March 2011. He then confirmed his statements of 23.02.2011 in the following manner:

*"IPO: Do you confirm what you stated it in its entirety?*

*MH: Yes. But I just want to make a change because I don't know the exact day because a longtime has past. I know it was July because we were harvesting the crops. From the beginning and until middle of July."*

This statement given to the prosecutor was upheld in court during the main trial.

The court finds it highly unlikely that the defendant has not heard of the well known attack on the Serbs in Opterusha in July 1998, and understands his stated ignorance as a way of protecting the legacy of KLA and the right fight for freedom.

As a relative of the defendant E.K, the court further sees his statement as one trying to protect his relative.

Although not being sure of the exact date, the defendant is however sure that E.K was wounded before the middle of July, in other words before the attack, because it was early in the wheat cutting season. However this is an occurrence that happens every year, and the court finds this unlikely that he could remember when during the cutting season of 1998 – 13 years ago – the wounding occurred.

In conclusion the court finds his statement on the timing of the injury of E.K not credible.

Considering the following, the impact of all the evidence given, the statements of Mu.H to the investigator as to the timing of when E.K was wounded, are found proven beyond reasonable doubt as false.

**11. The defendant Mi.H** gave his statement as a witness to the EULEX investigator in Rogove village on 23 February 2011, and stated that E.K is his uncle, but gives his statement voluntarily. He is also the brother of the defendant Mu.H. He further states that he doesn't know if E.K was a member of KLA when he was wounded, as this happened so long ago. He helped transport his uncle when he was wounded.

*“Investigator: When did this happen?”*

*Witness: As we have our own jobs, there was power-cut on 7<sup>th</sup> July 1998. The electric company told us that they will not put on the electricity unless we don't pay before 11<sup>th</sup> of July and we collected the money.*

*“E was wounded on 11 July 1998. I am guaranteed of that. I remember the day because on the same day I should have handed over the money to the electric company collector. My friend then gave the money to the collector. That night 11<sup>th</sup> July we had the power of electricity.”*

On 14 March 2011 Mi.H confirmed his statement given as a witness to the EULEX investigator and this he confirmed in court during the main trial.

Considering that the defendant E.K is his uncle, the court finds it understandable that he wants to protect his uncle.

The stated reason why he remembered the time his uncle E.K was wounded, the court finds too peculiar and thus not trustworthy.

When considering the whole evidence, as stated above and in the following, the court finds the statements of Mi.H given to the prosecutor on 23 February 2011 in Rogove village, as to the timing when E.K was wounded, as false beyond reasonable doubt.

**12. The defendant N.H**, when giving his statement as a witness in Rogove village on the 3 March 2011 stated that he has heard rumors of the attack on Serbian civilian houses in July 1998 in Opterusa and that he was a member of KLA, but not under the command of E.K. He states that he helped transport the wounded E.K to the school of Radobrava where they left him.

*Investigator: When did this happen?*

*Witness: My birthday is 11 June and this happened on 11 July. I am sure about this. I remember that I discussed with the people there and I said it was only a month ago I had my birthday and now this.*

*Investigator: Was there any other special things that happened during 11<sup>th</sup> of July 1998 that you would remember?*

*Witness: That night we were guarding outside my house and I discussed there what was happened.*

*Investigator: Was there electricity during 11<sup>th</sup> July 1998 or not?*

*Witness: It is hard to tell, because I was in need of the power.*

*Investigator: Who did you meet at the school in Radobrava?*

*Witness: I don't know, because we just left him over there and we came back here.*

As a defendant he confirmed his statements on 17 March 2011.

The court points to his membership in the KLA and finds this most likely influencing his statements as understanding to protect the legacy of the KLA. It further finds the above statements too peculiar and doubtful as to why he remembered the exact date when E.K was wounded. When considering the total evidence given, the court finds beyond reasonable doubt that his statement to the EULEX investigator on 3<sup>rd</sup> of March 2011 in Rogove village, as to when E.K was wounded, is false.

**13. The defendant N.B**, when giving his statement as a witness to the prosecutor on 3 March 2011, in Rogove, stated that he was a member of KLA from April 1998 and that he met the defendant E.K on the occasion that the latter was wounded, but after the war he has met E.K more often. When asked about the time when E.K was wounded, the following is taken from the statements given:

*“Investigator: When did it all happen that E.K got wounded and you helped him?”*

*Witness: It was the first week of July 1998. It was the 10<sup>th</sup> or 11<sup>th</sup> of July.*

*Investigator: How come you remember the date that exactly?*

*Witness: I remember it because Rahovac got under the attack of the Serbs forces. That attack was on the 17<sup>th</sup> or 18<sup>th</sup> of July 1998. I remember E got wounded about 1 week earlier before the 17<sup>th</sup> or 18<sup>th</sup> of July.*

*Investigator: How sure are you about this?*

*Witness: I am 100 % sure because I got wounded 2 or 3 days later than E.K got wounded.*

*Investigator: Has it in any way been registered that you got wounded.*

*Witness: This was under difficult circumstances so I don't think any registration was done. Anyway I was just treated by doctors 2-3 weeks after I got wounded.*

*Investigator: Do you know that you have to tell the truth. Otherwise you can get charged. Are you still sure about the date?*

*Witness: Yes I am. I don't lie. I kept a diary.*

*Investigator: Can I please see the diary.*

*Witness: No I do not have it.*

*Investigator: Where is the diary?*

*Witness: I kept the diary in my house and the house was burned down by the Serbs. It was in April 1999.*

*Investigator: Was E.K involved with the fighting in Opterusa?*

*Witness: I don't know.*

*...."*

On the 17<sup>th</sup> of March N.B was interrogated as a defendant and confirmed his statements given as a witness.

The court notes that the defendant was a KLA soldier and is understood as wanting to protect the legacy of KLA and of his fellow KLA soldier E.K whom he first met when "J" was wounded and has since met more often. As the court sees it this diminishes the credibility of the statements. In addition the court finds it somewhat peculiar that he only remembers the timing of the injury of E.K when he is mostly uncertain when asked to give dates.

Considering the total evidence leading to the conclusion that the defendant E.K was taking part in the attack on Opterusa on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998, the court finds it proven beyond reasonable doubt that the statements given by N. B to the EULEX prosecutor on 3 march 2011 in Rogove as to when E.K was wounded, were false.

**14. The defendant J.K** when giving his statement to the prosecutor as a witness on 8 February 2011 in Pristina, admits that he has a very good relationship with the defendant E.K and that he disagrees that someone attacked the houses of the Serbs in July 1998 in Operusa. He also stated that he was a member of KLA from May or June 1998 and was kind of leader and that E.K was operating in his village, which was Opterushe, and that he was involved in a battle together with E.K against Serb forces in Rogova village, and was with E.K when he was wounded and later drove the wounded E.K to the KLA hospital Garjak in Suhareka area.....

Furthermore he stated to the investigator *inter alia* the following:

*.... I have difficulties with names and the dates. But it was in the end of July or beginning of August. When they started to fight each other it was at least 20-25 days dafter E was wounded.*

*Investigator: When did you see E again?*

*Witness: I think I saw him around Randubrave around 10 days after. I heard that he moved from Garjak village to Rundubrave.*

*Investigator: Which condition was he in?*

*Witness His condition was a little bit better than when I left him. He was laying in a bed but he tried to stand up to say hello.*

*Investigator: What date was this?*

*Witness: All those things happened in July. He was injured in the beginning of July. I met him in middle of July and the fighting was happened in the end of July or beginning of August 1998....”*

On the 21th February the interview continued

*“...Investigator: What was the date when you were in a battle together with E.K and where E.K got wounded?*

*Witness: I don't remember the date. As far as I remember it was in the beginning of July 1998. I am not sure about the date.*

*Investigator: How sure are you about the dates?*

*Witness: I am more than 50 percent sure that E.K was wounded in the beginning of July 1998.*

*Investigator: How come you remember that it was beginning of July 1998?*

*Witness: In the end of June about 25-27<sup>th</sup> I was badly beaten by the Serb police. I believe that this incident with E.K happened about 1 week later. ...”*

On the 8<sup>th</sup> of March 2011 J.K was interrogated again and confirmed his statements of 8 February.

On the 15<sup>th</sup> March 2011 he was interrogated as a defendant and confirmed his earlier statements, this he also confirmed in court during main trial.

The court does not find it credible as to the timing of the events. The defendant is sure it was in the beginning of July that E.K was wounded, but the reason given is not believable.

The court also points to his relationship with E.K and his membership in KLA. It is therefore understandable that he wants to protect the legacy of the KLA and his friend and fellow earlier KLA member.

On this background the court finds his testimony doubtful.

When considering the total evidence, the main parts of which are mentioned above or in the following, the court finds it proven beyond reasonable doubt that the statements of the defendant J.K given to the EULEX investigator in Pristina on 8 February 2011 as to when E.K was wounded, false.

**15. The witness P.M**, when giving testimony to the EULEX investigator on 13 January 2011 stated that he was a KLA member from the autumn of 1998.

*Investigator: Do you know if E.K was wounded during the war?*

*Witness: I do not know. I heard that he was injured but I do not know where or when.*

*Investigator: Could he have been wounded before the attack on the Serbs houses.*

*Witness: No he was not for sure. It must have been later.*

In court the witness stated he didn't know.

The court doubts the witness's explanation in court that he didn't know or that it was a mistake in translation. In addition the court finds no reason why he should state this if it was not true. Consequently the court finds the statement above given to the EULEX investigator credible, that is, that Ka was not wounded before the attack.

#### **16. The witness A.H**

Dr. H. treated the wounded defendant E.K in the KLA field hospital. His statements in open court were considerably more uncertain than his previous statements to the EULEX investigator on 21.12.2010. The court finds his statements to the investigator more credible as it understands his statements in open court were under pressure of reluctance when witnessing against KLA-members, especially the defendant E.K. The court finds no reason why he should state something to the investigator that was not truthfully. His statements to the court are accordingly not considered as credible as his statements to the EULEX investigator on the 21.12.2010.

To the investigator on 21.12.2010:

*".....*

*Investigator: Did you or your staff register every patient?*

*Witness: I can say that 95 % of the patients were registered. But when we were in very urgent cases we were not able to register everyone. This system that I used was one that I created myself.*

*.....*

*Investigator:.....Have you found him (E.K) in those records?*

*Witness: Yes. Even though I initially could not remember that I had a patient for 2 weeks but I found the only entry available for this patient. And you can easily determine that his log book is a copy of the original. This log book is a document which is the only available document to register basic information about patients. The*

*record I have handed to you today, dates begin on 4<sup>th</sup> August 1998 and finishes on the 1<sup>st</sup> of September 1998. Each page is divided into 4 columns. The 1<sup>st</sup> column is the patient number. The 2<sup>nd</sup> column is the name and personal details of the patients. The 3<sup>rd</sup> is the diagnoses and the 4<sup>th</sup> column is the treatment. We could not keep any other note book.*

*Investigator: Can you describe the entry relevant to E.K.*

*Witness: The entry's date is 12<sup>th</sup> August 1998. The patient number or protocol is 1199. The name is E.K. Year of birth 1965. Place of birth is Opterushe/Opterrusa. The diagnose is entered in Latin as: "Vulnus Sclopetorium, Regio Lat. Dex", which means gunshot wound to the right side. If we are precise it seems that my assistant could not follow me correctly about the exact location on the body that the injury was. If I refer to what is written it is not exactly clear where the injury was. Column number 4, the treatment prescribed was for only 4 days of therapy, that is that he got medicine for 4 days. It was penicillin and 4 days of Gentamicin injection. I am more than sure using my common sense that if he would have been at the hospital for 2 weeks, I would have remembered him. If I refer to the protocol with his injuries he most probably stated at the hospital for maximum 1 or 2 days. But it is my belief from this record that he was just an out patient for 1 day. He was the 13<sup>th</sup> patient on that date.*

*Investigator: So for clarity, this entry for 12<sup>th</sup> August 1998. Is that the only record you have for treating E.K.*

*Witness: I am 99 % sure that this is the only entry I have for E.K. There could be an exception but I don't think so.*

*Investigator: In your best opinion did you treat E.K in July 1998 for a gunshot wound.*

*Witness: I do not have any other entry for him and I don't remember him. I can only refer to this official document.*

*Investigator: What hospital does this entry refer to?*

*Witness: It was Breshance. The distance between Breshance and Gajrak is approximately 7 or 8 kms.*

*Investigator: Do you know the village Rugova e Hasit?*

*Witness: Yes.*

*Investigator: If someone was injured in this village, where would they be taken?*

*Witness: Usually to wherever I would be, but only from there. There were no other places to go. People came from all over, even from far distances away.*

*Investigator: So even though you were moving between facilities, the injured would go to where ever you would be.*

*Witness: Yes, they would ask where I was and they would come to me. For some time I was the only medical facility operating in Kosovo. Some entries in this document even refer to some patients from Pristina.*

*Investigator: Do you have a similar record for July 1998?*

*Witness: Yes, I can provide it to you also. There is no record for E.K for July 1998 in it. But from looking at it I know that I was in Gajrak at that time.*

*Investigator: From looking at the record you have for E.K. Can you say when he received his injury.*

*Witness: No, I cannot say that, we were not in a position to keep that much detail. This record shows that he was most probably an outpatient that day. Since you are asking for specific details, I cannot say exactly when he received his injury, but as I have said I have no record for E.K on the 11<sup>th</sup> or 12<sup>th</sup> of July 1998.....”*

According to his own statements, E.K was hospitalized for 2 weeks following his gunwound. According to the testimony of dr. A.H he would most likely have remembered E.K if this was the case. However, dr. H didn't remember E.K being hospitalized when he was wounded.

Based on this, and the rest of the statements of the witness, given either in open court or to the investigator on the 21.12.2010, the court finds no credible evidence that E.K was wounded as stated by himself on the 11<sup>th</sup> or 12<sup>th</sup> of July 1998. On the contrary, based on the same abovementioned evidence by dr. A.H, the court finds it probable that E.K was wounded in the end of July/beginning of August 1998, that is after the attack.

The court notes however, that there are some uncertainties about the treatment that the defendant E.K received, in particular whether he was hospitalized or not.

However, as the court sees it, this uncertainty has no significant consequence as to whether E.K was wounded before or after the attack on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998.

### **17. The witness N.M,**

when testifying to the EULEX investigator on 19.01.2011, he stated inter alia the following:

“....

*Investigator: Do you know E.K?*

*Witness: We are from the same village. I have known him since he was a boy. He is about 20 years younger than me.*

*Investigator: Was he having any rank?*

*Witness: He was the KLA commander of Opterushe at the time when the Serbs were expelled from their houses. He has a good education.*

....”

The court sees no reason why the witness should give a false statement, or misunderstanding, about the abovementioned, and consequently finds this statement credible. His statements in open court are considerably modified and much more uncertain. The court understands this as the witness's effort to protect and aid the defendant E.K and therefore finds these statements less credible than his former statements cited above to the EULEX investigator.

### **18. The statements of the witnesses F.M,**

either given in open court or to the EULEX investigator, do not give any decisive evidence as to the timing of when E.K was wounded, as the court sees it.

### **19. On the other hand,**

the court refers to the statements of the **witnesses D.B and S.B**, who both state that they saw "J" amongst the soldier in the yard after the Serbs surrendered on the morning of the 18<sup>th</sup> of July. In addition the witness D.B states that her husband heard the voice of "J" on the night of the 17<sup>th</sup> of July warning her husband not to go outside, shortly before the shooting commenced.

In addition H.M in his statement to the prosecutor on 14 December 2010, explained that he met E.K in Opterushe shortly before the attack started on the 17<sup>th</sup> of July and that E.K did not seem wounded at that time.

The court finds the statements of the witnesses D.B, and S.B credible on this issue. In this connection the court points to their similar statements in this regard, which the court also finds logical. Furthermore they have been consistent in their statements during the investigation and main trial. In addition the court finds the statements of the defendant H.M to the prosecutor on the 14 December 2010, that he met E.K and spoke with him on the 17<sup>th</sup> of July in Opterushe, credible.

The court sees no reason why the above mentioned statements should be false or not reflecting what actually happened.

On this background, the court finds it proven beyond reasonable doubt that E.K was not wounded before the 17<sup>th</sup> of July 1998 and that he was present and participated in the attack on the Serbian houses on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 in Opterushe as stated in the charge against him.

Consequently the statements of the other defendants Mu.H, Mi.H, N.H, N.B and J.K are found false as to when the defendant E.K was wounded beyond reasonable doubt.

### **20. Was H.M a member of KLA?**

In his statements to the prosecutor, which was upheld in the open court, H.M has not admitted to being a member of the KLA. He has however on these occasions, explained that he had some kind of protective role in the neighborhood.

However in his statement to the prosecutor on 14 and 22 December 2010 as cited above, the defendant H.M stated *inter alia* that he was a KLA member, that he was in Opterushe on the 17<sup>th</sup> July 1998 and that special KLA units from the Drenica region arrived in the village, bringing the order to attack the Serbs living in Opterushe. He further stated that he tried to

convince the KLA commander not to launch the attack but he could not impede it. The defendant Ma also stated that KLA soldiers at one point opened fire against the Serbian households in Opterushe.

On the same occasion the defendant H.M stated that he was a carpenter and had installed doors in the Bo house. He also stated his visit to the Bo house some days before the attack started on the 17 July 1998. H.M further stated that in July 1998 he was a KLA member and that he headed or coordinated a group of soldiers, most relatives of his, in Opterushe.

In this respect the testimony of the defendant H.M on major points confirms the testimonies of the witnesses D.B and S.B.

The court sees no reason why the defendants should have given false testimonies at the beginning of the investigation confirming the testimonies of the witnesses D.B and S.B.

On the other hand, the court finds good reason why he should later give a different version denying his participation in the attack. By denying his statements to the prosecution on 14 December 2010, he is of course trying not to blemish the role of the KLA in the right fight for independence and freedom for Kosovo. He will not participate in what is seen as putting dirt on KLA or the soldiers fighting in the KLA. On this background he denies his testimony of the 14 December 2010 to the prosecutor, as the court finds it.

Based on this the court finds credible the statements given to the prosecutor on the 14<sup>th</sup> of December 2010 by the defendant H.M.

In conclusion the court thus finds that the defendant H.M was a KLA member in July 1998, including the time of the attack in Opeterushe on the 17 and 18 July 1998.

## **21. In Conclusion**

The court finds the statements of the witness D.B trustworthy and credible as to her knowledge and identification of the defendants E.K and H.M and that they were both present in the courtyard of the house of the witness in the morning of the 18<sup>th</sup> of July 1998.

The court has no problem trusting the statements by the witnesses that both E.K and H.M were armed with rifles during the attack, in spite of the initial trial uncertainty by the witness. Even after cross examination by the defense counsels, she maintained this.

On the other hand, the court finds the statements by E.K himself not credible as to his presence on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 and the time when he was wounded. As the court sees it, E.K saw his participation in the fight for freedom and independence for Kosovo as a just and right cause. He participated with no apparent consideration for any personal gain, and at a high cost for himself: that he was severely wounded during a shoot-out with Serbian/Yugoslav forces that is affecting his body condition and movements considerably even today. The attack on 17<sup>th</sup> and 18<sup>th</sup> of July was also at least partly justified, by Ka, on the background on several Serbian atrocities committed towards the Albanians during the war.

On this background, E.K will not admit any criminal liability in connection with his participation in the KLA, as the court sees it. Likewise he will not admit any wrongdoings on the part of KLA or himself. Even today he is a leader of the KLA-veterans in his region.

The court therefore and based on the general impression of E.K during the main trial, do not finds his statements about his presence on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 credible. On the other hand the court finds no reason to doubt the statements given by the witnesses D.B and S.B as regard the observation of E.K during the 17<sup>th</sup> and 18<sup>th</sup> of July. In addition the court finds the statements of the defendant H.M given to the public prosecutor on the 14<sup>th</sup> of December 2010 credible, as it inter alia finds no reason why H.M should implicate “J” by stating that he met with him in Opterusja on the 17<sup>th</sup> of July shortly before the attack started, if this was not the case.

The court finds the statements of the defendants Mu.H, Mi.H, N.H, N.B and J.K not credible as to the time stated when E.K was wounded.

Based on this, the court finds it proven beyond reasonable doubt that both defendants E.K and H.M, were members of the KLA at that time, and that they were present during the KLA attack on the Serbian household. E.K was present in the courtyard in the evening of the 17<sup>th</sup> and in the morning of the 18<sup>th</sup> July 1998. H.M was present in the courtyard in the morning of the 18<sup>th</sup> of July immediately after the Serbs surrendered and the attack was finished.

The defendants Mi.H, N.H, N.B, and J.K gave false testimonies as witnesses to the EULEX investigator as to the time E.K was wounded.

The question of a **civilian character of the Serbians being attacked** by KLA-forces on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 will be dealt with later (under VIII.3 the protected (civilian) status of the victims).

## **VII Legal assessment for war crimes**

Throughout the jurisprudence and according to the commentaries of the Article of the CCSFRY, the following conditions have been applied in order to find a defendant guilty of War Crimes.

### **1. The existence of an Internal armed conflict**

An armed conflict exists whenever there is a resort to armed forces whether between states or protracted armed violence.

According to International Criminal Tribunal for former Yugoslavia ( ICTY ) Judgment 3 April 2008, pages 56-57 paragraph 100 ( Case IT-04-84) the Trial Chamber *“is convinced that an armed conflict existed in Kosovo/Kosova from and including 24 April 1998 onward. The Trial Chamber received a voluminous amount of evidence relevant to armed conflict from May through September 1998.”*

In the ICTY judgment of 23 February 2011 par 1579 page 629 (Case IT-05-87/1-T) the Chamber concluded that *“as of the end of May 1998 an armed conflict existed in Kosovo between Serbian forces in particular forces of the VJ and the MUP, and the KLA. This armed conflict continued until at least June 1999.”*

As to Kosovo, it is considered that both an internal conflict (between Serbian forces and KLA forces existed) and an international conflict (between Nato and Serbian forces in Kosovo from 24 March 1999 until 10 June 1999).

Based on this, Court is satisfied that an internal armed conflict existed in Kosovo at the time of the KLA attack in the village of Opterushe on 17<sup>th</sup> and 18<sup>th</sup> of July 1998.

The cited articles from the Geneva conventions (common article 3 and 13.2.) are applicable in internal armed conflicts and therefore in the Kosovo conflict.

## 2. Participation of the defendants E.K and H.M in the armed conflict

As stated in the previous pages, the court has found it proven beyond reasonable doubt that both defendants E.K and H.M were KLA members at the time of the attack in Opterushe on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998. As KLA was a party in the internal armed conflict in Kosovo at this time, the court considers that the defendants participated in the armed conflict based on their KLA participation.

This has been sufficient also in previous cases. The court cites Gjelosh Krasniqi case from the District Court of Peja of 29.04.2009 (Pnr 67/09), especially pages 91-92.

## 3. The civilian (protected) status of the victims

The Article 3 Common to the four **Geneva Conventions of 12 August 1949 (Common Article 3)** and Article 13.2 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions (**Additional Protocol II**).

Common Article 3 states *inter alia* that

- (1) *Persons taking no active part in the hostilities, ..., shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, birth or wealth, or any other similar criteria. To this end, the following act are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
- (2) (a) *violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture.....”*

Article 13.2 of Protocol II states the following:

*“2. The civilian population as such, as well as individual civilian, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”*

Based on the earlier mentioned conclusions, the court finds it proven beyond reasonable doubt that the KLA attack on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 was directed towards the Serbian civilian population of Opatrovo.

**The Serbian House** was on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 occupied by Serbian civilian persons, the court finds proven beyond reasonable doubt.

According to the **witness D.B, the defendant H.M** made some sort of agreement with her husband, that they would protect each other. According to this, Ma had visited the house of the witness some time before and talked with her husband.

*“He told my husband ‘if there is a need to protect you because those 10 houses that you have remained in the village it does not make sense to lose the village because of you.’ My husband said that if the police come and we will not allow them and that is how we agreed and the agreement is agreement and they gave Besa and when they gave Besa they can be trusted. Unfortunately my husband trusted ‘H’ and he didn’t call anybody.” (last paragraph on page 18 of testimony on 28<sup>th</sup> of June 2011)*

*Public Prosecutor: Was there any occasion when your husband told Serbian police not to come?*

*D.B: Yes. When there is agreement with ‘H’ he didn’t call them and police called my husband and asked if they should come but my husband told them not to come.*

*Public Prosecutor: How long before the 17<sup>th</sup> of July did this happen?*

*D.B: Maybe 7-8 days. (top of page 19 on the Minutes of 28<sup>th</sup> of June 2011)*

Furthermore, during her testimony, the witness D.B, informs of the following (page 16 of the minutes from 28<sup>th</sup> of June 2011):

*“Public Prosecutor: Do you remember how many houses were in Opatrovo, all in all, Serbians and Albanians, all together?*

*D.B: There were not more than 10 houses of Serbs, not everyone was there. And there were approximately 260 Albanian houses.*

*Public Prosecutor: Do you have any other son apart that one that was with you at that night?*

*D.B: I have an older son, Bo .....*

*Public Prosecutor: Where was he at that night?*

*D.B: Fortunately, he was in the army where he was voluntarily sent by my husband and he was serving in Backa Topoca. He went to the army a month before that on 24<sup>th</sup> of June and the events that happened occurred in the 18<sup>th</sup> of July.*

*Public Prosecutor: Do you know anyone by name of Z...?*

*D.B: Yes, that is the son of B...*

*Public Prosecutor: And where was he at that night?*

*D.B : He was in the army as a paid professional: he worked in the army in Prizren.  
.....”*

During the cross examination of the witness S.B on the 29<sup>th</sup> of June 2011 by defense counsel Etem Rugova, the following can be extracted from the minutes page 27:

*“Etem Rugova: Were you wearing a military vest?*

*S.B: Yes. I had one. My son was in the army.*

*Etem Rugova: In what capacity was your son in the army?*

*S.B: Every country sends its citizens to the army. The invitation arrived and he went to the army; Six months before he joined to the army.*

*Etem Rugova: What happened to the military vest?*

*S.B: They took it from me.*

*Etem Rugova: Who are they?*

*S.B: KLA.*

*.....”*

Nothing in the proceedings have been presented that have contested the above mentioned statements from the witnesses D.B and S.B. The court sees no reason to doubt it. And it finds these statements of the above mentioned witnesses credible and trustworthy. None of the persons mentioned that were gathered in the Bo house had a status other than civilian. It was also clear to the witnesses D.B and S.B who was a soldier or a policeman and who was not.

From this the court draws the conclusion that the above proves beyond reasonable doubt that neither Serbian police nor the Yugoslav (Serbian) army were present or involved in the house of the witness on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998.

Based on the witness' statements, the court finds it proven further that the Serbs gathered in the house of the witness had weapons, including rifles and pistols, at their disposal and that these weapons were used on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 for self defense. Some of the weapons may even have been provided by the Serbian army. However the source of the weapon, whether bought for hunting purposes or provided by a military organization, is of no importance as long as the use of the weapon is not part of a military or paramilitary command structure or according to specific orders from a group, organization or command structure in some form from outside, as the court sees it.

The court has no indication during the main trial that these weapons were used for any other purpose than self-protection by the Serbian males gathered in the house when they were attacked by KLA forces.

As the court sees it, using weapons for self-protection during an armed attack, does not change the characteristics of the Serbian males as civilians. They were not organized or

integrated into a greater unit. There is no indication of a command structure outside of themselves, or of any orders being given or received to the Serbian males from anyone outside the Serbian house during the attack on the 17 and 18 July 1998, or before or after this attack.

There is no indication that the Serbs gathered in the Bo house in 17<sup>th</sup> and 18<sup>th</sup> of July 1998 in any way took part in the hostilities or the armed conflict between the KLA and Serbian military forces at the time.

The court finds that there is no other evidence presented that indicates any connection or involvement between the Serbs gathered in the Bo house during the attack and any outside military or para-military organization, in particular to any of the parties to the internal conflict at the time.

As for the Serbian females, they were gathered in the shelter of the basement from the time the shooting started on the night of the 17<sup>th</sup> of July until the early morning when all the Serbs surrendered to the attacking KLA forces.

On this basis – and seen in connection with all the other evidence given during the main trial - the court finds it proven beyond reasonable doubt that all the Serbs gathered in the house of the witness on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 were civilians not taking part in the hostilities between the KLA forces and the Yugoslav (Serbian) Army that took place from April 1998 to mid July 1999. They were thus under the protected status as civilians in the above mentioned Common Article 3 and 13.2 of Protocol II.

#### 4. A nexus between the alleged crime and the armed conflict

As stated in the previous pages, the court finds that the attack on the Serbian civilian house on the 17<sup>th</sup> and 18<sup>th</sup> July 1998 was related to the internal armed conflict between KLA forces and Serbian/Yugoslavian forces. This conflict was largely centered around ethnic lines and “ethnic cleansing”, meaning to remove from communities ethnic groups that were somehow considered belonging to the other ethnic group. Typically removing Kosovo-Albanian groups from areas controlled or dominated by Serbs and vice versa.

The attack on the Serbian house, in which were gathered most of the Serbian minority of the village of Opterushe, is thus typical of the internal armed conflict in Kosovo. The subsequent removal and killings of the Serbian male population, reveals a pattern that tragically was observed too often in this conflict.

A necessary nexus between the attack on the Serbian house and the armed internal conflict is thus considered established by the court.

#### 5. Re duality test: Was the attack a violation of international law effective at the time of the conduct, and also a violation of national law at the time?

The court finds that the armed attack by various KLA forces on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 against the Serbian civilian population of Opterushe gathered in the house of the witness D.B was in violation of the Common article 3 of the Geneva Convention and 13.2 of Protocol

II, as both these articles deal with the protection of civilian persons not involved in or part of the armed conflict.

The armed attack by KLA on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 was in violation of the Common article 3 (1) (a) which prohibits violence to life and person. The attack with firearms all through the night undoubtedly represented a serious danger to the lives of the Serbian civilian population inside the house that was thus attacked.

The attack by KLA can likewise be considered as measures of intimidation and terror on the Serbian civilians gathered in the house under attack.

The above mentioned Common article 3 and 13.2 of Protocol II is a law applicable in armed conflicts not of an international character and therefore a violation of the Common article 3 and 13.2 of Protocol II is thus by the court considered to be a violation of the law applicable during the conflict in Kosovo from April 1998 to mid July 1999.

The armed attack on the Serbian civilians in the house of the witness D.B on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 with firearms is further considered a serious violation as it undoubtedly represented a danger of serious bodily harm or life threatening situation to the Serb civilians.

The Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY) was in force in July 1998 in Kosovo. In Article 142 of the latter, war crimes may take one of two forms:

1. ordering of any of the mentioned actions, or
2. performing (“commits”) any of the mentioned actions.

One of the mentioned actions is applying measures of intimidation or terror.

Furthermore CCSFRY article 22 deals with complicity: If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.

Thus the duality test is satisfied.

The KLA attack on the Serbian houses on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 where the Serbian civilian population of Opterushe/Opterusha was gathered and as described above, constitutes an armed attack on the civilian population as prohibited and punishable by Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, currently criminalized under Articles 23 and 121 (1) of the Criminal Code of Kosovo, and in violation of the common Article 3 of the four Geneva Conventions of 12 August 1949 and of Article 13.2 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions (Additional Protocol II), all rules of international law effective at the time of the internal armed conflict in Kosovo.

#### 6. Participation in the KLA attack on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998

The alternative of ordering the criminalized action is not relevant in this case as it is not included in the confirmed indictment.

On this background the question is whether either of the defendants E.K and H.M in co-perpetration with other KLA-soldiers, participated in measures of intimidation and terror on the Serbian civilians on the 17<sup>th</sup> and 18<sup>th</sup> of July?

6.1 Did E.K , in co-perpetration with other KLA soldiers, participate in the attack on the Serbian civilian population?

The court has found proven beyond reasonable doubt that E.K:

1. was a KLA soldier and commander at the time of the attack
2. was armed and in a typical KLA-uniform at the time of the attack
3. was present in the village of Opterushe at the time of the attack
4. was aware that the planned attack was going to take place
5. was present outside the Serbian civilian house when the attack started in the evening of the 17<sup>th</sup> of July and when it ended in the morning of the 18<sup>th</sup> of July
6. communicated directly with D. B and warned him not to come out
7. at no point did oppose the order given by other KLA soldiers

What specific functions he had during the attack, what his specific role and actions were, are unknown. However, the abovementioned facts are enough to establish that E.K participated in the attack. In an attack, all soldiers have different duties and functions, depending on the various orders. But together the different functions and duties form essential and necessary parts of the attack. Therefore all functions and duties are necessary in the attack, and an active and willing participant should therefore be held accountable and responsible.

E.K knew about the attack, knew that it was directed against civilians and should therefore have known that it was illegal, but nevertheless in all likelihood as nothing else is indicated; he willingly participated in it, even if he must or should have known its meaning and consequences. His **criminal intent** is thereby established.

Based on this, **E.K participated in the attack and as thus is found guilty of this charge.**

6.2 Did H.M participate in the attack on the Serbian civilian population?

The court has found proven beyond reasonable doubt that H.M

1. was a KLA member at the time of the attack
2. was armed and in a typical KLA-uniform at the time of the attack
3. was present in Opterushe at the time of the attack
4. was present in the yard of the Serbian house at the end of the attack

As to the question of whether he participated in the attack, the court's majority, points to the following:

1. he was on friendly terms with the Serbians in Opterushe

2. he did carpentry work at the Bo house
3. he warned the Serbian population of a possible attack and offered to help them
4. he was in strong opposition to any orders against the Serbs
5. he would not cooperate with the KLA unit from another district when asked to do so
6. he was present at the scene unwillingly
7. he forced the other members of his unit not to be present during the attack
8. his presence was limited to the morning of the 18<sup>th</sup> of July
9. he left the scene as soon as he could after the attack and went home
10. he did not fire a single shot and afterwards his rifle was taken from him by the KLA
11. he was reprimanded for being an unwilling and uninvolved participant

Based on this, the majority finds that his bare presence and his reluctance is not sufficient to establish an active participation in the attack. In order to be held criminally liable, not only presence at the crime scene is necessary. It is also necessary to establish criminal intent, or willing participation. In this case, H.M had no intent to participate in the attack and did not participate in the attack.

On the other hand, the court's minority, points to the following;

1. he was present, armed and in uniform at the scene, at least in the morning of the 18<sup>th</sup> of July
2. he alone from his unit, was present in the attack, and told his men not to be present, and that he himself was forced to be present

The minority admits that he was against the attack, that he voiced his opposition to it, and was unwilling to be present during the attack. Nevertheless he was present at the scene during the attack, armed and in uniform. The motivation of Ma is in this respect irrelevant, as long as he is present. Soldiers may have different attitudes to orders; agreeing or disagreeing. Nevertheless, they are not asked about their attitude or whether they agree or disagree with an order. What is important is that they follow the order given, no matter what their personal feelings about it are, as long as the order is not illegal. In this case the order was illegal, and thus Ma was not obliged to follow it. Nevertheless he followed the illegal order.

In the end H.M followed the order to attack the Serbian civilian house, and thus at least provided moral support to the attack.

H.M knew about the attack and that it was illegal. He knew that he was participating in it. In the opinion of the minority this suffices to establish **criminal intent** in this case.

By so doing the minority finds that H.M has passed the threshold of participating in the attack.

**Based on the opinion of the majority, H.M is acquitted.**

### VIII The defendants Mu.H, Mi.H, N.H, N.B and J.K

These 5 defendants are charged with violation of Article 305 paragraph 2 of the CCK in that they aided E.K to elude discovery by giving false witness statements supporting E.K's alibi defence.

As the court reads Article 305, paragraph 2 deals with assisting the perpetrator after the attack and is more general than paragraph 1.

Paragraph 1 has a more limited scope dealing *inter alia* with persons that harbor the perpetrator or aid him to elude discovery in certain ways mentioned, or in any other way. The point is, however, that paragraph 1 is limited to helping the perpetrator to elude discovery of himself, or to help him hide in some way from criminal prosecution. As E.K was in detention when the statements were given, E.K could thus not elude discovery. This fact was known to these defendants.

On the other hand, paragraph 2 is a more general prohibition of assisting a perpetrator.

False statements during an investigation would normally fall under crimes dealing with directly false statements. However, Article 307, which deals with false statements given by witnesses, is limited to court proceedings.

The court finds that court proceedings start with the indictment. In this case the indictment was filed on the 30 March 2011, after the statements in question were given, so article 307 does not apply.

Clearly, lying as a witness, is morally deplorable and should be criminalized. As the majority of the court sees it, it therefore naturally falls under the category of assisting the perpetrator under article 305 paragraph 2. Not all forms of assistance to a perpetrator can or should be criminalized. A certain form and extent have to be demonstrated in order for criminal liability to be applied.

Lying to an investigator in a serious case, however, has both the form and the extent needed to constitute a crime. In most countries it may also be assumed to be a criminal offense.

As the defendants were all warned before giving their statements that giving false statements may constitute a criminal offence, they were clearly aware of their obligation to tell the truth. In addition, giving false statements under an investigation would also be a well known violation to a normal person.

When the defendants in spite of this, gave false statements, each of the five defendants **knew** they were giving false statements and **willingly** did so. Each of the defendant's **criminal intent** is thus demonstrated beyond reasonable doubt as the court sees.

On this background, the court finds that each of the defendant, by giving false statements to the investigator in the dates and places mentioned above, have thus assisted E.K in violation of Article 305 paragraph 2. Each of them are thus guilty as charged.

### **IX Sentencing**

**E.K** has been found guilty of violation of Articles 22 and 142 of Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY) which is currently criminalized under Article 23 and 121(1) of the Criminal Code of Kosovo (CCK).

When there is a difference between older and newer legislation, the defendant shall according to the principle stated in CCK article 2 (2) be entitled to the most favorable law.

CCSFRY article 142 is seen as the most favorable law in this case stating a minimum sentence of 5 years of prison and a maximum of 20 years.

Article 64(1) of CCK list factors to be taken into consideration when calculating the punishment.

The court finds no mitigating circumstances in the case of the defendant E.K. The court has found it proven beyond reasonable doubt that he willingly and knowingly – and thereby with the necessary intent - was a commander of the KLA in Opterushe on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998, that he participated in the armed attack on the civilian Serbian houses from the initiation on the night of the 17<sup>th</sup> throughout the night and early morning of the 18<sup>th</sup> of July, and that he at no time voiced an objection to the attack on the Serbian civilian. However, the order to attack came from KLA forces outside of Opterushe, and the attack started when these other KLA forces arrived in Opterushe.

As the court finds it, the defendant E.K did not participate in the attack on the Serbian civilian population in Opterushe in order to gain something personally for himself. The court understands his participation as part of a righteous fight for independence and freedom for Kosovo against – what the defendant sees – an oppressive and violent treatment of the Albanian population by the Serbs.

On this background the court finds that all elements considered, E.K shall be punished by a prison sentence of 5 years.

According to Article 73 (1) CCK time served in detention shall be included in the punishment of imprisonment.

E.K has served in detention on remand from 14 December 2010 until being released on the 2 August 2011. This period shall be deduced from his prison sentence of 5 years.

According to the Kosovo Code of Criminal Procedure Article 102 (1) the court shall decide whether the person found guilty must reimburse the costs of criminal proceedings. The court finds that the defendant E.K has unnecessarily prolonged the criminal investigation and proceedings against himself by denying his presence in Opterushe on the 17<sup>th</sup> and 18<sup>th</sup>

of July 1998 by claiming he was wounded before the attack. Furthermore he has involved the defendants Mu.H, Mi.H, N.H, N.B and J.K in criminal proceedings by using their loyalty and friendship to the KLA and himself.

On this background the court finds that the defendant E.K must reimburse the cost of the present criminal proceedings. In addition he alone shall cover the additional cost of apprehension and escort during the court proceedings.

**The defendants Mu.H, Mi.H, N.H, N.B and J.K** has been found guilty of violation of Article 305 paragraph 2 of CCK by assisting E.K by willingly and knowingly giving false statements as witnesses as stated above. According to Article 305 (2) punishment shall be imprisonment of six months up to five years.

When calculating a sentence for these violations, the court points to Article 307 which deals with giving false statements in court proceeding as an **indication** of what level of punishment would be appropriate. Article 307(1) states punishment between a fine or imprisonment of up to one year.

All of these defendants did not give false statements for any personal gain, as the court sees it. On the contrary, these defendants gave false statements as part of a duty to the right cause of KLA in their fight for freedom and independence for Kosovo and for their respect and/or friendship to the defendant E.K, as they understand it. Although this is not found to be a mitigating circumstance, the court nevertheless sees it as a factor that should influence the final calculation of an appropriate punishment for these violations.

Although each of the listed defendants shall be considered individually, the court finds little of significant individual variation that leads to differences in calculating punishment for these defendants.

However based on the above, the court finds that Articles 42 ff of CCK applies, as a suspended sentence achieves the purpose of a punishment for each of the defendants Mu.H, Mi.H, N.H, N.B and J.K. Furthermore none of these defendants has a previous criminal record.

The court finds the conditions for imposing a suspended sentence under Article 44 exist and that time period pursuant to Article 43 (2) is set to one year. If each of the defendant during this period does not commit another criminal offence, the prison sentence shall not be executed.

### **X Cost of proceedings**

According to the Kosovo Code of Criminal Procedure (KCCP) Article 102 (1) the court shall decide whether the person found guilty must reimburse the costs of criminal proceedings. The court finds that the defendant E.K has unnecessary prolonged the criminal investigation and proceedings against himself by denying his presence in Opterushe on the 17<sup>th</sup> and 18<sup>th</sup> of July 1998 by claiming he was wounded before the attack. Furthermore he has involved

the defendants Mu.H, Mi.H, N.H, N.B and J.K in criminal proceedings by using their loyalty and friendship to the KLA and himself.

On this background the court finds that the defendant E.K must reimburse the cost of the present criminal proceedings. In addition he alone shall cover the additional cost of apprehension and escort during the court proceedings.

According to Article 102 (1) the court decides that each of the defendants Mu.H, Mi.H, N.H, N.B and J. K shall also reimburse the costs of the present criminal proceedings.

As all the defendants found guilty must reimburse the costs of the criminal proceedings against themselves, they shall do so jointly and severally pursuant to KCCP article 102 paragraph 3 as the specific costs for each of them cannot be specified more accurately.

Recording clerk

Presiding Judge

Tarik Mripa

Tore Thomassen

#### LEGAL REMEDY

Authorized persons may file an appeal against this judgment to the Supreme Court of Kosovo through the District Court of Prizren within fifteen (15) days of the day the copy of the judgment has been served to them.